

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

60426

FILE: B-181694

DATE: JAN 27 1976

099302

99408

99196

MATTER OF: Admiral Richard G. Colbert, USN, Retired  
(Deceased)

DIGEST: Navy officer whose permanent grade was rear admiral (0-8) and who was serving as an admiral (0-10) under 10 U.S.C. 5231, was transferred directly to the temporary disability retired list (TDRL) pursuant to 10 U.S.C. 1202 and then died before the Senate could confirm him on the permanent retired list as an admiral (0-10) pursuant to 10 U.S.C. 5233. Regardless of the grade to which he was entitled on the retired list under 10 U.S.C. 1372, or other law, under Formula No. 2, 10 U.S.C. 1401, such member's retired pay while on the TDRL is to be computed on basic pay of an admiral (0-10) and Survivor Benefit Plan annuity based thereon.

This action is in response to a letter with enclosures, from Mr. C.R. Davies, Disbursing Officer, Retired Pay Department, Navy Finance Center (file reference XO:MTP:blf 081 32 6038), requesting an advance decision concerning the proper grade to be used in the computation of the retired pay of Admiral Richard G. Colbert, USN, Retired (Deceased), 081 32 6038, for purposes of the Survivor Benefit Plan, 10 U.S.C. 1447-55 (Supp. II, 1972). The request has been assigned submission number DC-N-1224 by the Department of Defense Military Pay and Allowance Committee and forwarded to this Office by Office of the Comptroller of the Navy letter (file reference NCF-411, 7220/6-1).

The submission indicates that Admiral Colbert was appointed to the grade of admiral (0-10), apparently with the advice and consent of the Senate, pursuant to 10 U.S.C. 5231 (1970), to serve as Commander in Chief, Allied Forces, Southern Europe. Due to the development of a serious illness, he departed his command on November 25, 1973, and was transferred to the temporary disability retired list under 10 U.S.C. 1202 (1970), effective that same date, in his permanent grade, rear admiral (upper half, 0-8). A nomination was sent to the Senate pursuant to 10 U.S.C. 5233 (1970), for the purpose of effecting his appointment on the retired list in a grade commensurate with the highest grade he held while on the active

PUBLISHED DECISION

55 Comp. Gen. ....

B-181694

list (admiral). However, before the Senate could act on the nomination Admiral Colbert died on December 2, 1973.

The order which transferred Admiral Colbert to the temporary disability retired list provided that he was released from all active duty "effective 2400 on 24 Nov 1973" and was transferred to that list on November 25, 1973, in such grade as he "may be entitled on date of retirement pursuant to provisions of Title 10, USC 1202." He was posthumously appointed to the grade of admiral on the retired list pursuant to 10 U.S.C. 1521 (1970); however, pursuant to 10 U.S.C. 1523 (1970), such a posthumous appointment does not provide entitlement to "any bonus, gratuity, pay or allowance."

By memorandum dated January 15, 1974, the Head, Retirement Branch, Navy Finance Center, determined that since Admiral Colbert had not been confirmed on the retired list as an admiral (0-10) by the Senate prior to his death, his retired pay and survivor benefits must be based on the pay of a rear admiral (upper half, 0-8). Accordingly, Admiral Colbert's retired pay was computed based on 75 percent of the basic pay of a rear admiral (upper half 0-8) with over 30 years of service. Based on that computation, his retired pay due for the period of November 25 through December 2, 1973, was paid to his widow, Mrs. Prudence A. Colbert, as his beneficiary. In addition, based on such computation of retired pay, a Survivor Benefit Plan annuity was established in favor of Mrs. Colbert.

Since a greater retired pay entitlement and Survivor Benefit Plan annuity would result if it is determined that Admiral Colbert's retired pay should have been computed based on the grade of admiral (0-10) rather than rear admiral (upper half, 0-8), the disbursing officer requests advice as to the proper grade to be used in such computation.

Enclosed with the disbursing officer's letter is a copy of an opinion of the Judge Advocate General of the Navy in which it is indicated that the matter is complex and troublesome and suggesting that its resolution is dependent upon the interplay of different statutes enacted at different times for different purposes. After a discussion of the various statutes involved, the opinion concludes that strong arguments exist for the position that legislation would be necessary to establish Admiral Colbert's retired pay and his widow's annuity as based on the pay of an admiral (0-10).

B-181694

As was indicated previously, at the time Admiral Colbert was placed on the temporary disability retired list he was serving in the grade of admiral (O-10) pursuant to the provisions of 10 U.S.C. 5231 (1970), which is the current codification of section 413 of the Officer Personnel Act of 1947, August 7, 1947, ch. 512, 61 Stat. 795, 875. Subsection 5231(a) provides in pertinent part as follows:

"(a) The President may designate officers on the active list of the Navy above the grade of captain and, in time of war or national emergency, above the grade of commander for--

"(1) command of fleets or subdivisions of fleets;

"(2) command of naval units afloat to perform special or unusual missions; or

"(3) performance of duty of great importance and responsibility.

An officer so designated may be appointed by the President, by and with the advice and consent of the Senate, to the grade of admiral or vice admiral. Such an appointment is effective on the date the officer reports for the designated duty and terminates on the date he is detached. \* \* \*

A similar statute applying to the Marine Corps is 10 U.S.C. 5232 (1970) which was derived from section 415 of the Officer Personnel Act of 1947, 61 Stat. 876.

Concerning retirement of officers serving in such positions, 10 U.S.C. 5233 (1970) provides as follows:

"An officer who is serving or has served in a grade to which appointed under section 5231 \* \* \* of this title may, upon retirement, be appointed by the President, by and with the advice and consent of the Senate, to the highest grade held by him while on the active list and with retired pay based on that grade."

B-181694

That provision is derived from sections 414 and 415(e) of the Officer Personnel Act of 1947, as amended by subsection 6(4) of the act of May 20, 1958, Public Law 85-422, 72 Stat. 122, 129.

Provisions similar to 10 U. S. C. 5231, 5232 and 5233 relating to generals and lieutenant generals of the Army (10 U. S. C. 3066) and Air Force (10 U. S. C. 8066) are also derived from the Officer Personnel Act of 1947, subsections 504(b) and (d), 61 Stat. 886-888.

The Judge Advocate General indicates that the question to be resolved is whether the provisions of 10 U. S. C. 5233 constitute the only mechanism by which an officer appointed under 10 U. S. C. 5231 can lawfully be appointed on the retired list to the highest grade held while on the active list with retired pay based on the pay of that grade, or whether other provisions of law may provide alternate means. In this regard, the Judge Advocate General further indicates that he has found only one decision, 38 Comp. Gen. 167 (1958), to be of some relevance.

As stated by him, that decision involved an Army officer who was first retired in 1953 in the grade of major general and who was advanced on the retired list to the grade of general with the advice and consent of the Senate, under the provisions of section 504(d) of the Officer Personnel Act of 1947, 61 Stat. 888. Under the provisions of that law at that time, such an advancement did not entitle him to increased retired pay. Subsequently, his military records were corrected to show that he had been placed on the temporary disability retired list in 1953 rather than retired under other provisions of law. He was later recalled to active duty and then retired again in 1958. The question involved in the case concerned the application to him of the active duty pay increases provided in the act of May 20, 1958, Public Law 85-422, supra, and not whether by virtue of the correction of his records he was properly placed on the temporary disability retired list in the grade of general in 1953. However, since it was stated in the decision that he was entitled to temporary disability retired pay based upon the active duty pay of the highest grade held by him on the active list (general) by virtue of such correction of records, that decision lends some support to the view that Admiral Colbert would likewise be entitled to be placed on the retired list under 10 U. S. C. 1372 in the highest grade he held on the active list (admiral).

B-181694

It is clear that Admiral Colbert could not be retroactively appointed to the grade of admiral (O-10) on the retired list pursuant to 10 U.S.C. 5233. See 38 Comp. Gen. 340 (1958) and 41 Comp. Gen. 43 (1961). As was stated in the orders transferring Admiral Colbert to the temporary disability retired list, such transfer was made pursuant to the authority of 10 U.S.C. 1202 which was derived from subsections 402(a) and (b) of the Career Compensation Act of 1949, October 12, 1949, ch. 681, 63 Stat. 802, 816-817. Section 1202 of title 10 provides in pertinent part as follows:

"Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay \* \* \* would be qualified for retirement under section 1201 of this title but for the fact that his disability is not determined to be of a permanent nature, the Secretary shall, if he also determines that accepted medical principles indicate that the disability may be of a permanent nature, place the member's name on the temporary disability retired list, with retired pay computed under section 1401 of this title."

Section 1401 of title 10, United States Code, provides a table of formulas specifying methods of computing retired pay for certain types of retirements. Formula No. 2 of that table provides the method of computation to be used in computing disability retired pay of members covered by 10 U.S.C. 1202 and provides in part in column 1 thereof that such computation is to be based on the--

"Monthly basic pay of grade to which member is entitled under section 1372 or to which he was entitled on day before \* \* \* placement on temporary disability retired list, whichever is higher." (Underscoring added.)

The before-cited provisions of Formula No. 2 of section 1401 are derived in part from section 402(d) of the Career Compensation Act of 1949. However, the underscored portion of that formula was added by subsection 6(7)(A) of the act of May 20, 1958, Public Law 85-422, 72 Stat. 122, 129, which appears to have been added

in the conference committee consideration of H. R. 11470, the bill which became Public Law 85-422. The legislative history of the provision gives no reason for its addition; however, it should be noted that it was section 1 of Public Law 85-422, which created pay grades 0-9 and 0-10 and assigned vice admirals, lieutenant generals, admirals, and generals to those grades. Thus, since such pay grades were specifically treated in that law, in view of the conditions and limitations otherwise imposed by Congress on the retired grade and retired pay of members serving in those higher grades, e. g. 10 U. S. C. 5233, it would appear that the provision added by subsection 6(7)(A) was intended to authorize payment of the higher rate of retired pay to such members while on the temporary disability retired list pending return to the active list or placement on the permanent retired list in the higher grade.

In the present case, the highest grade the member ever held on the active list was admiral (0-10), which was the grade in which he was serving on the day before placement on the temporary disability retired list. Therefore, it is not necessary for this Office to decide whether Admiral Colbert was entitled to be placed on the permanent retired list in the grade of admiral without Senate confirmation since in computing his retired pay we must apply the specific and unambiguous language of column 1 of Formula No. 2 of 10 U. S. C. 1401. Compare Selman v. United States, 204 Ct. Cl. 675 (1974); 55 Comp. Gen. 58 (1975); and 47 Comp. Gen. 696, 700 (1968). Under those provisions, Admiral Colbert was entitled to receive retired pay based on the grade of admiral (0-10) while on the temporary disability retired list regardless of his actual grade entitlement on the retired list.

Accordingly, it is our view that Admiral Colbert's retired pay for the period during which he was on the temporary disability retired list (November 25 through December 2, 1973), should be recomputed based on the monthly basic pay to which he was entitled on the day before placement on the temporary disability retired list (admiral (0-10)) and the amount due paid to his beneficiary (Mrs. Colbert). Additionally, Mrs. Colbert's Survivor Benefit Plan annuity should be recomputed on that basis from December 3, 1973, less any increase in premium cost which was due prior to the member's death.

Deputy

RECEIVED

Comptroller General  
of the United States